

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CASE NO. 10-RC-231745

ELON UNIVERSITY,

Employer,

and

SEIU WORKERS UNITED SOUTHERN REGION,

Petitioner.

ELON UNIVERSITY'S BRIEF IN SUPPORT OF REQUEST FOR REVIEW

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Employer's Brief in Support of Request for Review¹

I. Summary of Facts and Argument

In its Order issued on April 13, 2020, the National Labor Relations Board (“NLRB” or “Board” herein) granted Elon University’s (“Elon,” “University” or “Employer” herein) Request for Review of the Acting Regional Director’s (“RD” herein) Decision and Direction of Election (“DDE” herein) in part “as it raises a substantial issue with respect to the continued application of the Board’s ‘majority status rule’ as articulated in *Pacific Lutheran University*, 361 NLRB 1404 (2014).”

As Elon has consistently maintained throughout this representation proceeding, in finding that the faculty members petitioned-for by the Union, i.e., limited term, visiting and part-time faculty, are not “managerial employees,” the RD departed from longstanding Supreme Court and Board precedent. Thus, the RD failed to adequately consider Elon’s unique shared governance system and the collective role that *all* faculty play in the decision-making process for all relevant aspects of University operations. Specifically, the RD applied *Pacific Lutheran University*, 361 NLRB 1404 (2014), to find that petitioned-for faculty are not “managerial employees” for the sole reason that they do not constitute a majority of the members of the Academic Council or any of the various governance committees. (DDE at 18). Thus, the RD “found it unnecessary” to even evaluate the issue of whether Elon’s shared governance system results in its faculty properly being treated as “managerial” under Supreme Court and NLRB authority based on their collective role in governing the University in collaboration with Elon’s administration. The RD did not even consider *Pacific Lutheran’s* five-factor test with respect to the entire faculty’s essential role in decision-making at Elon, through such entities as its

¹ Elon incorporates by reference its previous filings in this case as well as the record evidence presented at prior hearings.

Academic Council and other university-wide or school-specific committees that oversee academic and other operational issues. (DDE at 18).

The DDE herein was predicated solely on the “majority rule” requirement articulated in *Pacific Lutheran*. It follows that if *Pacific Lutheran* was wrongly decided with respect to this requirement for committee representation, the DDE in this case likewise is flawed and cannot serve as the basis for the certification of the Union. In the wake of *Pacific Lutheran*, the D.C. Circuit Court of Appeals has specifically held that *Pacific Lutheran*’s “majority rule” requirement is plainly erroneous. Thus, in *University of Southern California v. NLRB*, 918 F.3d 126, 136 (D.C. Cir. 2019), the Court unequivocally held that the “subgroup majority status rule” adopted in *Pacific Lutheran* is contrary to the Supreme Court’s holding in *NLRB v. Yeshiva University*, 444 U.S. 672 (1980). Accordingly, the instant case presents the Board with a compelling reason to overrule *Pacific Lutheran*’s “majority rule” requirement, reinstate prior Board cases that have correctly applied *Yeshiva*’s standards, and properly align the Board’s analysis with controlling Circuit and Supreme Court precedent.

The faculty at Elon act as one collegial body to exercise managerial authority. Thus, faculty members from all classifications or groups vote to elect representatives on the Academic Council and other committees; and members from all classifications can serve on the Academic Council and other committees. By definition such individuals are “managerial employees” and, therefore, ineligible for union representation. This “managerial group” specifically includes the limited term, visiting and part-time faculty members sought in the petition filed by the SEIU Workers United’s (“Union” herein). Members of these classifications serve as active participants in Elon’s unique shared governance system. Indeed, Elon has long guaranteed that

at least one representative of the part-time faculty has a seat on the Academic Council with a voting right that is entirely equal to that of all other members of the Academic Council.

Supreme Court precedent compels the dismissal of any petition seeking representation among managerial employees. *Yeshiva, supra*. The positions sought herein are clearly managerial; and, any application of the “majority status” rule to vitiate such managerial status is clearly erroneous as a matter of law. Accordingly, the Employer herein renews its request that any petition seeking an election among such managerial employees be dismissed and any certification of representative resulting therefrom be vacated.

II. Procedural Background

On November 30, 2018, the Union filed a petition seeking to represent continuing track, lecture track, limited term, visiting and adjunct faculty teaching at least one credit-bearing undergraduate course in Elon’s College of Arts and Sciences, School of Communications, School of Education, and Martha & Spencer Love School of Business.² In response to Elon’s Statement of Position which asserted that the Union was improperly seeking to represent faculty who were “managerial,” the Union on the morning just prior to the opening of the pre-election hearing filed an Amended Petition to exclude continuing track and lecture track faculty members from the voting unit. (B-2)

The Hearing Officer immediately granted the Union’s Amended Petition at the opening of the hearing on December 7. (Tr. 9). However, Elon renewed its position at the hearing that the petition nonetheless should be dismissed on the grounds that the remaining members of the

² The facts discussed herein are based on the record established at the pre-election hearing held on multiple dates in December 2018. Unless otherwise designated by witness name, “Tr. ____” refers to the testimony of Dr. Steven House, Provost and Executive Vice President of Elon University at the time of the pre-election hearing. “B” refers to Board exhibits; “ER” to Employer’s exhibits, and “P” to Petitioner’s exhibits.

proposed bargaining unit also were “managerial employees”; and, thus, ineligible for union representation. Elon also requested that the hearing be continued in view of the Union’s sudden and substantial modification of the proposed bargaining unit. (Tr. 8-11). The Hearing Officer denied Elon’s request. The Hearing Officer then required Elon to argue for the right to present evidence on the managerial issue. (Tr. 21-22). After extensive discussion on and off the record, the Hearing Officer eventually relented and permitted Elon to present evidence to establish a record but delivered an admonishment, which she indicated came directly from the RD, to Elon regarding its burden of proof to establish managerial status. (Tr.23-29). The Hearing Officer then required Elon to present evidence immediately by calling a witness. The hearing continued through December 12, 13 and 14, 2018.

On February 5, 2019, Acting Regional Director Terry D. Combs issued the Regional Director’s Decision and Order (“DDE”), rejecting Elon’s contention that the petitioned-for job classifications were “managerial employees”. The RD refused to analyze the issue on the merits solely because members of the petitioned-for unit did not make up a majority of the Academic Council or any other governing committee at Elon. (DDE at 18). Applying the “majority rule” analysis, the RD then found that the amended petitioned-for unit of Elon’s limited term, visiting and adjunct faculty employees in its four undergraduate schools was appropriate. A mail ballot election was directed.

Voters were mailed ballots on February 19, 2019, and the ballots were counted on March 12, 2019. The Union received a majority of the votes cast.

On March 19, 2019, Elon timely filed Employer’s Objections to Election, which included a contention that certain faculty members as “managerial employees” exerted improper influence on behalf of the Union. After an investigation, the Regional Director issued an Order

directing a hearing on the Objections which was held on April 2, 2019. The Employer presented testimony and documentary evidence in support of its Objections. The Hearing Officer's Report on Objections was issued on May 13, 2019, in which the Hearing Officer recommended that all of the Employer's Objections be overruled.

On May 28, 2019, the Employer filed its Exceptions to Hearing Officer's Report on Objections. On September 3, 2019, the Acting Regional Director of Region 10 issued his Decision and Certification of Representative denying the Employer's Objections to Election and certifying the Union as the collective bargaining representative for the petitioned-for unit.

On September 17, 2019, Elon timely filed the instant Request for Review. On December 13, 2019, Counsel for Elon requested to withdraw the portion of the Request for Review relating to Elon's Objections to Election, and on December 18, 2019, the Executive Secretary granted Elon's partial withdrawal of its Request for Review. On April 13, 2020, the Board granted Elon's Request for Review in part regarding the "majority rule" aspect of the DDE as it relates to the managerial employee issue.

III. Statement of Facts

A. Overview of University

Elon is a mid-sized liberal arts university with approximately 6,200 undergraduate students and 800 graduate students. (Tr. 30-32). Elon is organized into six schools: (1) Arts & Sciences; (2) Education; (3) Communications; (4) Business School; (5) Health Sciences; and (6) Law School. (Tr. 31, 151, 176-77; ER-17). Except for the law school, the schools are located on a residential campus in the town of Elon, North Carolina. (Tr. 30-31, 151-53; ER-10). Elon is recognized as the preeminent university in the nation for engaged and experiential learning. (Tr. 32).

Elon has a President who reports to a Board of Trustees. (ER-2 at 12; Tr. 32-33). The Provost/Executive Vice President reports to the President. (Tr. 33).³ Each school has an academic Dean who reports to the Provost/Executive Vice President. (Tr. 33). The Provost/Executive Vice President is responsible for each of the academic units and his areas of responsibility include student learning, student life, admissions, budgeting and long-range planning. (Tr. 33-34).

Elon utilizes the following types of appointments under its faculty model: tenured, tenure track, continuing track, lecture track, limited term, visiting and part-time. (ER-1; ER-2 at 50-51; Tr. 42-51). Tenured, tenure track, continuing track, lecture track, limited term and visiting are full-time appointments. (ER-1; Tr. 173-74). Limited term is a full-time teaching position that may be renewed annually for up to four years total. (ER-2 at 51, 143-144; Tr. 156-57). Visiting is classified as a permanent appointment that may be renewed annually for up to three years and may then be renewed annually for an additional three years. (ER-2 at 50, 142). Similar to the other full-time appointments, limited term and visiting faculty typically teach a full course load of 24 semester hours per year. (ER-2 at 51; Tr. 173-74). Part-time faculty members, sometimes referred to as adjunct professors, are hired semester by semester to teach a specific course or courses; however, their contracts often are renewed semester to semester. (ER-2 at 145; Tr. 48-49, 156).

With 577 faculty positions at Elon, the number of the positions included in the Union's petition (178) make up just 31% of the total faculty population. (ER-17). The breakdown is as follows: limited term – 42; visiting – 2; and part-time – 134. Unlike many larger universities,

³ Dr. House is no longer the Provost/Executive Vice President and a new Provost has been hired.

Elon part-time faculty teach approximately 15% of the undergraduate courses. (*See, e.g.*, P-7 at 24-36; ER-22 at 8).

B. Shared Governance

Faculty members at Elon, including limited term visiting and part-time faculty, essentially run the University with respect to all academic and a variety of other issues. (ER-2 at 12; Tr. 57-58, 61-62). Elon operates under a shared governance system with all faculty members having a primary role as to all aspects of the University's operations. (Tr. 61-67, 74-75, 89). "Elon's commitment to shared governance acknowledges that collective intelligence leads to better decision making and creates an optimal environment for fostering academic integrity, delivering quality educational programs, and ensuring academic freedom and democratic practice." (ER-2 at 12).

"Faculty Rank" is extended to all employees university-wide teaching full-time, including all limited term and visiting, and to all part-time faculty members teaching 18 or more semester hours in an academic year. (ER-2 at 10; Tr. 260-61). Those with "Faculty Rank" can vote on any and all matters taken up at faculty meetings. (ER-2 at 10, 23; Tr. 54-56, 109).

All faculty members are covered by the Faculty Handbook. (ER-2; Tr. 51-52). The Faculty Handbook is not a set of policies collecting dust on a shelf but rather is the living document that guides the operations of the University on a daily basis and includes the Faculty Bylaws which have been incorporated into the Handbook. (ER-2 at 4, 23-48; Tr. 52-54, 61). The Faculty Handbook in its entirety, including Bylaws, was developed by and is revised from time to time by the Academic Council, the coordinating committee of the faculty consisting of 19 faculty members who are elected by other faculty members. (ER-2 at 4, 24-28; Tr. 52-62, 57-58, 89-90). Faculty members who have voting privileges under the Bylaws, that is, full-time

faculty and part-time faculty members teaching 18 or more semester hours in an academic year, are eligible to vote on the election of members of Academic Council, including divisional and school representatives. (ER-2 at 25). At large members to Academic Council are elected by all faculty university-wide who are present and eligible to vote at the March faculty meeting each year, and those eligible to attend and vote include limited term and visiting and part-time faculty teaching 18 or more semester hours in an academic year. (ER-2 at 25). The University President and/or the Provost typically attend Academic Council meetings but have no voting rights. (Tr. 74).

As a general rule, any faculty member who is a voting member under the Bylaws is eligible to serve on Academic Council, provided he or she has two or more years' service on the faculty. This would include all limited term and visiting faculty, and all part-time faculty members teaching 18 or more semester hours in an academic year (ER-2 at 25; *see also id.* at 23 (defining voting privileges)). However, there are additional restrictions placed on eligibility for many of the Academic Council positions, e.g., a representative of a School must hold the rank of a Senior Lecturer or above. (ER-2 at 25). Therefore, more than a decade ago, Elon designated one of the 19 positions exclusively as a part-time faculty representative in order to ensure that part-time faculty had meaningful participation in this aspect of shared governance. (Tr. 59-60, 214-19; P-1). The part-time faculty representative is elected bi-annually by other part-time faculty members and can only be a current employee who has taught two contiguous semesters at Elon. (ER-2 at 26; Tr. 60). As of the time of the pre-election hearing, the current part-time representative had served for nearly two years, regularly attended the Academic Council meetings and served as a voting participant on all decisions made by the Council. (Tr. 59-60, 70-71, 83-84; ER-3, ER-5, ER-6, ER-8).

Faculty meetings for all faculty members are normally held three times per semester - at which faculty consider and vote on a wide variety of issues impacting the University, the students, and the faculty. (ER-2 at 30-31; ER-4; ER-9; Tr. 54-58, 71-75). The meeting is conducted jointly by the President and the Academic Council. With the exception of part-time faculty teaching less than 18 semester hours in a year, all faculty members, including limited term, visiting and part-time faculty members, are eligible to vote, if present at the meeting. (Tr. 54-56; 108-09). In addition, all faculty members (including those teaching less than 18 semester hours) are eligible and invited to attend the meeting. (Tr. 236). At the close of the meeting, all faculty members present are provided with an opportunity to raise any issues of concern, and any issues raised are discussed and considered for action where appropriate. (ER-4; ER-9)

The Academic Council serves as the key vehicle for Elon's shared governance system by bringing together in one body all of the expertise of faculty spread throughout a diverse campus. (Tr. 59-61). Actual areas of responsibility for all faculty individually and through the Academic Council include setting academic standards for admission of students, determining courses of study and standards of performance, establishing the processes to evaluate student performance, standards for selection, promotion and tenure of faculty, "[making] rules for conduct for aspects of students' lives relating to the educational process and to discipline students for infractions," and defining ethical and professional standards for members of the faculty (ER-2 at 24; *see also* ER-3; ER-4; Tr. 61-62). While receiving input from the President, Academic Council sets the agenda for its meetings. (ER-2 at 27). Academic Council meets twice a month during the academic year. (ER-2 at 28).

As provided in the Faculty Handbook, Elon through the Academic Council has also created a number of standing committees on which faculty -- including limited term faculty,

visiting faculty and part-time faculty -- are eligible to serve depending upon the specific criteria established for each committee. (ER-2 at 31-46, 177-200; P-3; Tr. 63-67, 97-107; 260-62). The Academic Council appoints faculty members to certain standing committees based upon a slate provided by the Academic Council's Committee on Committees, while members of other committees are elected by their faculty peers, such as the University Curriculum Committee and corresponding School and Division-based Curriculum Committees, and Promotion and Tenure Committee. (ER-2 at 31-32; Tr. 63-64, 78; P-3; P-4). Faculty make up a substantial majority of the positions on virtually all of the standing committees. (ER-2 at 31-46). For example, the University Curriculum Committee, which makes decisions for all areas of instructional programs at Elon, is made up of ten elected faculty members, the Provost, University Librarian, and Director of Elon Core Curriculum. (ER-2 at 36-37). Some standing committees consist entirely of faculty members as the only positions with voting rights, e.g., the Promotion and Tenure Committee and the Post-Probationary Faculty Development Review Committee. (ER-2 at 43-45).

The Academic Council and Elon administration coordinate to establish additional committees, advisory councils and task forces from time to time based on evolving issues to be addressed. (ER-2 at 200-21; Tr. 64, 118-19, 127-28; P-3; P-4; P-5). For example, a faculty member at Elon since 2008 provided testimony regarding her committee experience over the past decade. As an adjunct faculty member, she served on the curriculum resource advisory committee which made decisions regarding expenditures and resources to provide for the curriculum resource center in the School of Education. (Tr. 341-42). Later while still an adjunct, she along with two other adjuncts and three full-time faculty served on a curriculum design committee to explore an early childhood major within the School of Education. (Tr.

342). The Committee spent two years researching early childhood programs, creating the proposed curriculum, preparing a licensure program certifying teacher candidates to teach children from infancy to kindergarten, and developing the process to obtain accreditation approval from North Carolina. (Tr. 342). The Committee shared their curriculum design with the faculty in their department, received their feedback, and made revisions. Then they presented the proposed curriculum to the School of Education, then to the University Curriculum Committee and finally to the Academic Council where the new major as well as a minor in early childhood education were approved. (Tr. 342-43).

This faculty member later became a limited term faculty member and then full-time lecturer, all the while and up until the time of the hearing continuing her committee service, eventually taking a leadership role within the department and serving on Elon committees external to the School of Education. (Tr. 343-45). This faculty member further described the process of committee work, task forces and surveys of faculty, all of which provide the opportunity to obtain change both within the School and across the University, including actions approved by the Academic Council based on input received from these various sources. (Tr. 346-48)

Through the Academic Council and various committees, advisory councils and task forces, the faculty at Elon, including all full-time and part-time faculty as one collective group, exercise actual control and/or provide effective recommendation within Elon's decision making structure in multiple ways. (Tr.73-75, 83-85). In many instances decisions are made and implemented without the need for the issue to be submitted to the Board of Trustees because the President or her designee would have been involved throughout the process as a non-voting member on the shared governance body. (Tr. 84, 94-95, 108, 117, 235-40). In fact, there is no

example, and thus no record evidence, of the President or the Board of Trustees disapproving any decision made by Elon's faculty. (Tr. 90).

IV. Argument and Authorities

A. "Managerial Employee" Definition

1. Supreme Court Authority

In *NLRB v. Yeshiva University*, 444 U.S. 672 (1980), the Supreme Court found the faculty members of Yeshiva University to be managerial employees, and thus excluded from NLRA coverage. In so concluding, the Court found that a private university is in the business of education and, accordingly, faculty that "formulate and effectuate management decisions by making operative the decisions of their employer" are "managerial employees." *Id.* at 682 (citing *Bell Aerospace Co.*, 416 U.S. 267 (1974)).

By way of historical review, the Court explained that the NLRA was intended to accommodate the type of management-employee relations that prevail in private industry, which is in contrast to the typical "mature" private university where authority is divided between a central administration and its collegial bodies. 444 U. S. at 679. The Court noted that the predominant policy of a university is:

to operate a quality institution that will accomplish broadly defined educational goals within the limits of its financial resources.

The 'business' of a university is education, and its vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions.

The problem of divided loyalty is particularly acute for a university like Yeshiva, which depends on the professional judgment of its faculty to formulate and apply crucial policies constrained only by necessarily general institutional goals. The

university requires faculty participation in governance because professional expertise is indispensable to the formulation and implementation of academic policy.

It is clear that Yeshiva and like universities must rely on their faculties to participate in the making and implementation of their policies. The large measure of independence enjoyed by faculty members can only increase the danger that divided loyalty will lead to those harms that the Board traditionally has sought to prevent.

Id. at 688-90.

In dicta the Court noted that its decision did not foreclose the possibility that certain professors could have the right to union representation:

It is plain, for example, that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research. There thus may be institutions of higher learning unlike Yeshiva where the faculty are entirely or predominantly non-managerial. There also may be faculty members at Yeshiva and like universities who properly could be included in a bargaining unit. It may be that a rational line could be drawn between tenured and untenured faculty members, depending upon how a faculty is structured and operates.

Id. at fn.31.

The record here establishes that Elon is operated almost identically as to how Yeshiva was structured in the 1970s. With respect to *Yeshiva's* governance considerations, Elon is not a “modern university” where the task of operating the university has shifted from faculty to administration. *Id.* at fn.29. To the contrary, operational governance at Elon resides principally with its faculty, including those sought by the subject petition. Additionally, and as provided in the mission statement developed by the faculty and approved by the Board of Trustees, in exercising such governance authority, “Elon University embraces its founders’ vision of an academic community that transforms mind, body and spirit and encourages freedom of thought and liberty of conscience.” (ER-2 at 5). Union representation is simply incompatible with this

independence enjoyed by faculty members. The mission statement applies with equal force to *all* faculty members, including “untenured” faculty. Such individuals are, in no way, excluded from the operation of the university. They have a vital role in decision making which inevitably creates the potential of the “divided loyalty” that so concerned the Supreme Court should they become represented by a union. This prospect underpins the definition of a “managerial employee” who must be excluded from NLRA coverage.

Importantly, nowhere in its decision in *Yeshiva* did the Court even hint that in order for faculty members to be found to be “managerial,” they must make up a majority of the committees working on policy decisions of a university. Suffice it to say, the Court in no way was contemplating that the headcount of committee representation would be controlling, but rather was focused on the quality of the input contributed by the faculty body as a whole toward the running of the university.

2. NLRB Decisions Since *Yeshiva*

Since *Yeshiva* was decided in 1980, and up until *Pacific Lutheran* in 2014, there have been over 20 NLRB decisions dealing with whether faculty are “managerial.”⁴ A number of these cases have excluded faculty members from union representation due to their roles in decision-making within the private institution at issue. As one of many factors discussed in applying the *Yeshiva* standards, the Board has occasionally referenced whether faculty constitute a majority on the membership of a particular committee engaged in work on a specific academic matter. *See generally LeMoyne-Owen College*, 345 NLRB at 1130, n.25 and n.26 (noting in finding managerial status of full-time faculty, that faculty represent a majority of most committees but the record was unclear on others); *University of Great Falls*, 325 NLRB 83, 95

⁴ Citations to the NLRB “managerial” faculty cases decided since *Yeshiva* can be found in *LeMoyne-Owen College*, 345 NLRB 1123, 1131 n.30, 1133 n.1 (2005) and *Pacific Lutheran*, 361 NLRB at 1418, n.30.

n.39 (1997)(summarizing prior cases that consider whether faculty comprise majority membership in various academic committees).⁵ However, in none of these cases did the Board hold that majority representation on governing committees must be held by the sub-group of faculty members included in a union's petitioned-for unit. To the contrary, the Board typically has compared the number of committee positions held by all faculty collectively in contrast to non-faculty, *e.g.*, administrators and staff, to determine whether faculty, in essence, could be out-voted on crucial issues.

3. *Pacific Lutheran* Created Standards Not Consistent with *Yeshiva*

In *Pacific Lutheran University*, 361 NLRB at 1419, the Board created an entirely new analytical framework applicable to cases involving the possible managerial status of university faculty, but before doing so confirmed its obligation to adhere to the holdings in *Yeshiva*:

As a result, "[i]t is plain that professors may not be excluded merely because they determine the content of their own courses, evaluate their own students, and supervise their own research." While some areas of faculty decision-making involve policies largely limited to their own classrooms and labs, others involve policies that have a greater effect on the university as a whole. It is when faculty exercise actual or effective decision making authority over policies for the university as a whole that their interests begin to align with management, thereby creating the problem of divided loyalty that the managerial employee exception seeks to avoid. Ultimately, the Court characterized as "[t]he controlling consideration in this case ... that the faculty of Yeshiva University exercise authority which in any other context unquestionably would be managerial." It found they did. "To the extent the industrial analogy applies," the Court concluded, "the faculty determine the product to be produced, the terms upon which it will be offered, and the customers who will be served."

Id. at 1419 (quoting *Yeshiva*, 444 U.S. at 686, 690) (internal citations omitted).

⁵ In none of these instances did the Board hold that a majority of the committee in question must be composed of faculty members in general in order for it to be reflective of managerial status. More to the present point, until *Pacific Lutheran*, the Board had never even suggested that "subgroup majority" status was in any way required to render such committee participation indicative of managerial status.

The Board in *Pacific Lutheran* asserted that many of the universities of today have become more corporate in structure and consumer driven than they were when *Yeshiva* was decided thirty-four years ago. 361 NLRB at 1422-23. *Pacific Lutheran* apparently was such an institution in the eyes of the three-member majority. Thus, while purporting to recognize its obligation to follow Supreme Court precedent, the Board majority nevertheless established its own new standards to evaluate the new “corporate” university model. But when considering a traditional shared governance model such as *Elon’s*, the Board must not lose sight of the overriding concern of *Yeshiva* to avoid the creation of, again in the words of the Supreme Court, “divided loyalty” for faculty through unionization. *See generally University of Southern California*, 365 NLRB No. 11, slip op. at 1-5 (2016) (Miscimarra, dissenting from denial of review).

The Board in *Pacific Lutheran* most notably deviated from *Yeshiva’s* concern over “divided loyalty” when it unduly focused on majority membership on committees without regard to the underlying work of the committee as a whole, particularly in footnote 36:

In those instances where a committee controls or effectively recommends action in a particular decision-making area, the party asserting that the faculty are managers must prove that a majority of the committee or assembly is faculty. If faculty members do not exert majority control, we will not attribute the committee's conduct to the faculty.

Then, in reviewing the reasons that *Pacific Lutheran* did not carry its burden of establishing managerial status, the Board stated “no contingent faculty member has yet served on a university committee. But even if they did, they would be a minority of the university committee as their membership is currently structured, and such committees appear to be advisory in any event.” 361 NLRB at 1428.

Yeshiva does not require that faculty make up a majority of any particular committee in order to find managerial status. Moreover, to the extent the Board intended to mean that the faculty within the petitioned-for unit must constitute a majority of any relevant committee to be considered, this sub-majority requirement is not only inconsistent with *Yeshiva* but cannot be found in any of the twenty plus NLRB decisions reported during the nearly 35-year period since *Yeshiva*. *Pacific Lutheran* constituted a radical departure from precedent, and one for which no rationale was ever provided.

4. The Board in USC Wrongly Followed the Sub-Majority Rule

Despite its irrationality, the Regional Director in Region 31 (as well as the RD in the instant case) construed *Pacific Lutheran* to mandate application of the new sub-majority rule. The RD in Region 31 cited footnote 36, as well as the above summary finding from *Pacific Lutheran*, to conclude that non-tenure track faculty at USC do not exercise decision-making authority because they do not constitute a majority of any university committee. *University of Southern California*, 365 NLRB No. 11, slip op. at 27 (2016). Member Miscimarra in his dissent disagreed with the RD's conclusion that non-tenure track faculty at USC could not be managerial because "they do not constitute a majority" of the relevant decision-making committees and provided the following reasoning based on *Yeshiva*:

There, the Court held that a faculty member may possess managerial authority even though he or she cannot individually establish policy separate from the committees on which he or she serves. Similarly, faculty members in an individual department or program may be managerial, even if as a group they are a minority of the total faculty and are outnumbered and outvoted on every issue. The Regional Director's newly fashioned "majority status" requirement contradicts these principles and cannot be reconciled with the Court's holding in *Yeshiva*.

365 NLRB No. 11, slip op. at 4. Member Miscimarra further correctly pointed out that "even faculty who indisputably exercise managerial authority on a university-wide basis could be

treated as non-managerial if organized in separate departmental units, each of which was a minority on any given governance body.” 365 NLRB No. 11, n.7. The majority opinion acknowledged the dissent’s criticism of the RD’s focus on the role of non-tenure track faculty, as opposed to faculty members generally, on university committees, yet stated in a conclusory fashion that the RD’s “focus” was consistent with *Pacific Lutheran*. 365 NLRB No. 11, n.1.

Consistent with the arguments of Member Miscimarra, the D.C. Circuit last year denied enforcement of the NLRB’s decision that USC’s contingent faculty were not managerial employees, specifically rejecting the *Pacific Lutheran* requirement that the employees in the petitioned-for unit must constitute a majority of the committee members engaged in decision-making. *University of Southern California. v. NLRB*, 918 F.3d 126 (D.C. Cir. 2019). In reviewing the requirements of *Yeshiva*, the D.C. Circuit stated:

These repeated references to the "faculty" as a body are not linguistic accidents; they are central to the Court's reasoning. Take the Court's discussion of the bedrock principle underlying the managerial exception: that employers deserve the loyalty of employees who exercise discretionary authority over central employer policies. 444 U.S. at 687-88. Highlighting that the faculty functions as a single body, the Court observed that if, consistent with principles of shared governance, the university "depends on the professional judgment of its *faculty* to formulate and apply crucial policies," then the university deserves those employees' "undivided loyalty," which in turn triggers managerial status. *Id.* at 682, 689. The Court's analysis turned not on an aggregation of the power delegated to a series of individuals or a mosaic of subgroups—the focus of the Board's subgroup majority status rule—but rather on the role played by the faculty as a body.

Reinforcing this idea—and this is *Yeshiva*'s second theme—the Court repeatedly stressed the importance of collegiality. "[A]uthority in the typical 'mature' private university," the Court explained, is split between the administration and "one or more collegial bodies." *Id.* at 680. The Court observed that "[t]he Board itself has noted that the concept of collegiality 'does not square with the traditional authority structures with which th[e] [NLRA] was designed to cope,'" and that "traditions of collegiality continue to play a significant role at many universities." *Id.* (second alteration in original) (quoting *Adelphi University*, 195 N.L.R.B. 639, 648 (1972)).

The Board's subgroup majority status rule is unfaithful to this critical aspect of *Yeshiva*. It ignores the possibility that faculty subgroups, despite holding different status within the university, may share common interests and therefore effectively participate together as a body on some or all of the issues relevant to managerial status. It is entirely plausible that, for example, non-tenure-track faculty, especially full-time non-tenure-track faculty, would agree with tenure-track faculty on questions of course offerings, academic integrity, and grading policies. Yet the Board's subgroup majority status rule presupposes that non-tenure-track faculty have no authority over such matters unless they constitute a majority of the relevant committee.

918 F.3d at 136-37.

In rejecting the RD's analysis in the *USC* case and his reliance on *Pacific Lutheran*, the D.C. Circuit concluded: "... the question the Board must ask is not a numerical one—does the subgroup seeking recognition comprise a majority of a committee—but rather a broader, structural one: has the university included the subgroup in a faculty body vested with managerial responsibilities?" 918 F.2d at 137. The D.C. Circuit further held: "If this analysis demonstrates that the subgroup seeking recognition is structurally part of a faculty body to which the university has delegated managerial authority, then ... that ends the matter: the subgroup is managerial regardless of whether its members constitute a majority of the relevant committees or whether they even participate at all." 918 F.3d at 138.

B. Application of "Managerial Employee" Analysis to Elon's Faculty

Elon submits that the *Pacific Lutheran* analysis as modified by the instruction provided by the D.C. Circuit in *USC* should be adopted by the current NLRB:

The Board should instead, as required by *Yeshiva*, think of this analysis as having two distinct inquiries: whether a faculty body exercises effective control and, if so, whether, based on the faculty's structure and operations, the petitioning subgroup is included in that managerial faculty body.

918 F.3d at 139.

The RD in the instant case made the same mistake as the RD in *USC* by holding that the faculty subgroup defined in the petition for representation at Elon -- not the faculty as a whole

-- must hold a majority of committee seats. (DDE 15-18).⁶ Therefore, he did not reach the substantial issue of shared governance existing at Elon University. In fact, he expressly declined to evaluate the *Pacific Lutheran* five-factor test. (DDE 18). As suggested by the Board's April 13 Order in the instant case, the RD's decision is defective and must be reversed.

Once Elon's shared governance model receives proper consideration, it is abundantly clear that the petitioned-for faculty at Elon are "managerial employees" and cannot be included in a bargaining unit for union representation because to do so would violate the standards set forth by the United States Supreme Court in *Yeshiva*.

1. The Faculty Body At Elon Exercises Effective Control

Consistent with the specific issue identified by the Board in its April 13 Order, Elon will assume *arguendo* the current Board accepts *Pacific Lutheran* as good law with respect to the factors to be considered in determining managerial authority. The Board identified five areas of faculty decision-making that are dispositive on whether faculty members actually or effectively control the decision making pertaining to central policies of the University and are thus "managerial employees" and not appropriately included in the bargaining unit. Primary areas include: (1) Academic Programs - establishing and setting requirements for curriculum, research, major and minor offerings, and certificate offerings; (2) Enrollment Management - setting the size, scope, and make-up of the student body; and (3) Finances - controlling issues

⁶ The Union's amended petition included only three out of seven job classifications, and the number of employees in the petitioned-for unit constitute less than one-third of the total faculty population. (ER-17). Thus, because they represent only 31% of the overall faculty population and regardless of the depth of participation in shared governance by limited term, visiting or part-time faculty, it would be nearly impossible for them to make up the majority of any committee involved in shared governance. 918 F.3d at 138 ("slicing and dicing the faculty in different ways – by tenure status, school, seniority, etc." would wrongly allow for faculty who indisputably exercise managerial authority to be categorized as non-managerial). A result based on the number of people serving on a committee bears no relation to the requirement of *Yeshiva* that the Board's primary obligation is to determine whether union representation is incompatible with the role faculty play in university decision-making.

related to financial decisions, including income, expenditure, net tuition, budget, and financial aid. Secondary areas include: (1) Academic Policies - teaching and research methods, grading, academic integrity, syllabus, and course content; and (2) Personnel Policies and Decisions - hiring, promotion, tenure, leave, and dismissal. 361 NLRB at 1420.

Faculty members at Elon, including limited term, visiting and part-time faculty, are substantially involved in the decision-making process with respect to the three primary areas listed above as well as the two secondary areas of academic policies and personnel policies. Through the Academic Council, various university and department committees and through faculty meetings, Elon faculty exercise actual control or provide effective recommendation within Elon's decision-making structure in multiple ways, thus making them inappropriate for inclusion in any collective bargaining unit. (Tr. 57-58, 89); *see Marywood University*, Case 4-RC-173160 (2016) (applying *Pacific Lutheran's* factors, Regional Director dismissed Union's petition due to the "managerial" status of the University's "full-time and pro-rata faculty") (rev. denied 2017 NLRB LEXIS 221); *LeMoyne-Owen College*, 345 NLRB 1123 (2005) (petition for full-time faculty dismissed because faculty members exercise substantial authority in several areas identified in *Yeshiva* and therefore are "managerial" employees). The recommendations of the faculty are approved by the Board of Trustees where applicable, or are followed by the President for those issues not requiring Board approval. No exceptions were identified in the record.⁷

Each one of the five areas is discussed below.

⁷ In contrast to the Academic Council at Elon, the Academic Senate at *USC* was found by the NLRB to be advisory to the President who also had the final authority for amending the faculty handbook. *University of Southern California*, 2106 NLRB LEXIS 910 at *33-35.

a. Academic Programs

Elon's Academic Council is empowered to, among other things, determine courses of study, make rules for the implementation of the instructional program, evaluate the effectiveness of the instructional program, and make recommendations to the Board of Trustees "on any matter pertaining to the educational program of the University." (ER-2 at 24; Tr. 61-62, 89). All of the Academic Council members attend their scheduled meetings and all vote on a wide variety of academic-related issues. (ER-3; ER-8). In addition, one of the key standing committees in Elon's shared governance model is the University Curriculum Committee that is responsible for the curriculum at Elon and meets frequently to review proposals for modifications prepared by the school or division committees. (Tr. 65, 134-35).

Dr. House and other witnesses provided several examples establishing the hands-on nature of Elon's faculty with respect to Elon's academic programs. As one recent example, Academic Council, in coordination with Engineering Faculty and the University, School, and Departmental curriculum committees, established a new engineering major. Elon historically only had a 3+2 major for engineering, meaning that the student spent three years at Elon then had to transfer to another school to complete the engineering degree. Elon invested a significant amount of financial support up front to conduct a feasibility study which was utilized by the Academic Council in making their recommendations. Once a consensus was reached to move forward, including Board approval, the committees developed not only the specific curriculum but identified the resources needed to support the new degree, such as facilities and faculty members. (Tr. 65-66). In sum, as a result of multi-year efforts of Elon's faculty through its curriculum committees, Academic Council, and faculty meetings, Elon recently launched a new four-year program pursuant to which a student may now obtain a bachelor's degree in

engineering without having to transfer to another university. This required a substantial investment of funds by the University along with revisions to its academic catalog and other materials, all of which were faculty driven. (Tr. 65-66, 75-80; ER-5, ER-6, ER-7).

Faculty members have also spearheaded the creation of a number of other new majors and minors at Elon. These started within the applicable school's curriculum committee, then to the University Curriculum Committee, the Academic Council and to the faculty meeting. (Tr. 113, 117-18). For example, in the music department, a new major in Music Production and Recording Arts evolved from the technology-driven aspect of music with respect to production and recording. The music department developed a proposal which was submitted to the Fine Arts and Humanities Curriculum Committee within the College of Arts and Sciences. This committee reviewed the proposal rigorously and fine-tuned it. It was then presented to the University Curriculum Committee, *i.e.*, the standing committee which must evaluate curriculum changes on behalf of the entire University. (Tr. 113-14). Once this standing committee concluded its work, the specifics for the new major were presented to the Academic Council for approval, where all 19 members, including the part-time faculty representative, had the opportunity to accept, modify, or reject the proposal, and they ultimately approved it. The entire faculty later approved the new music major at a faculty meeting. The new music major did not require Board of Trustees approval; thus, it was driven entirely by faculty initiative. (Tr. 114-17).

A similar process was followed to establish a new major in public health. (Tr. 113-18). The idea for the major originated from several departments – psychology, human service studies, sociology, and anthropology. (Tr. 117-18). From the efforts of the faculty in these departments, the major was developed and moved through the curriculum committees, then to

the University Curriculum Committee, to the Academic Council and then to the entire faculty for approval. (Tr. 113-18). Dr. House described this as “a big one for us”, yet it did not require Board approval because it did not require the spending level of the engineering major. (Tr. 113, 117-18).

Even the creation of a new minor would follow the same process. A minor in Astronomy is one example. (Tr. 113-18). A faculty member provided detailed testimony regarding her committee’s work when she was an adjunct within a department in the School of Education to obtain a new early education major and minor by presenting and obtaining approval from the University Curriculum Committee and ultimately from Academic Council. (Tr. 341-43).

b. Enrollment Management Policies

Elon’s Academic Council is also empowered “[t]o recommend academic standards for admission of students to, and continuation in, Elon University.” (ER-2 at 24). Limited term, visiting and part-time faculty members are eligible to serve on the Admissions Committee, which is responsible for recommending University admissions standards to the President. (ER-2 at 180). The majority of the seven members of Admissions Committee is made up of four faculty members elected by faculty. (ER-2 at 180).

The Admissions Committee works closely with the University to determine threshold requirements for student admission. For example, they determine the desired SAT/ACT scores and grade levels necessary for admissions. (Tr. 90). In addition, they establish procedures for reviewing individual applications that are on the borderline of acceptability and collectively make decisions on acceptance for admission. (ER-2 at 180). They also determine the grade requirements for a student to remain within a major or to obtain a degree within the major. (Tr. 90).

As discussed below, the Budget Committee works hand in hand with the Admissions Committee to adjust enrollment targets as necessary to meet the requisite student enrollment.

c. Finances

The shared governance model has application as well to financial and budgeting issues. (Tr. 120). Various committees, which include faculty representatives, are responsible for the budget, long-term planning, and strategic planning of the University. (Tr. 120-26).

Significantly, the Provost is in charge of the Budget Committee, meaning even the financial issues at Elon receive faculty input. (Tr.120-21). The Budget Committee, which includes two faculty members, receives requests from all units of the University, including academic units. The Budget Committee hosts two budget forums in which all the faculty and staff are invited and requested to provide their feedback. (Tr. 123-24). After the first forum, the Budget Committee revises its proposed budget and returns to present its updated version to the faculty and staff to receive their input. Eventually, the Budget Committee recommends a budget which is ultimately presented to the President and Board for approval. (Tr. 124). A substantial aspect of the budget is setting the tuition amount which in turn means targeting the number of students needed which then impacts the work of the Admissions Committee to set admission standards. Likewise, there are critical decisions to make with respect to allocations of revenue for areas covered in the strategic plan and the operations of the University, including drilling down to specific issues such as travel money to be allocated to faculty. (Tr. 125).

At the time of the hearing, the University was in the process of developing a new 10-year strategic plan, and faculty were integral to developing the strategic plan as members of the Strategic Planning Committee and sub-committees that function as part of the Strategic Planning Process. (Tr. 125-26).

d. Academic Policies

The Academic Council is empowered “[t]o determine and to maintain current requirements for granting of academic degrees.” (ER-2 at 24). As one example, faculty members raised a concern with respect to challenges in providing mid-term grades during the semester and championed a proposal to Academic Council to provide students with a mid-term assessment rather than a traditional letter grade. (Tr. 68-70). The Academic Council ultimately developed and approved a new policy for providing students with mid-term assessments, which included modification of the Faculty Handbook. (ER-3; Tr. 69-70). These changes were reported to the full faculty for comment and were approved, thus resulting in an impact on every student at the University in their learning process, specifically a better approach to make students more successful by making them aware of adjustments needed to complete the course successfully. (ER-4; Tr. 71-75).

e. Personnel Policies and Decisions

The Academic Council is empowered to exercise each of the following forms of authority with regard to University personnel:

“To determine and recommend to the Board of Trustees standards for selection, promotion, and tenure of faculty members.”

“To evaluate . . . performance of individual faculty members in execution of the program.”

“To discipline members for infractions of faculty rules.”

“To define ethical and professional standards for members of the faculty.”

(ER-2 at 24).

As discussed earlier, the Faculty Handbook, which was developed and has been revised through the efforts of the Academic Council, contains numerous policies bearing on faculty personnel matters, including documentation and forms for evaluation of faculty performance.

(Tr. 91, 136-37). For example, during Dr. House's tenure, there have been at least two faculty evaluation changes that arose from committee involvement, Academic Council evaluation and ultimate submission to the faculty for approval. (Tr. 91-93).

With respect to discipline of faculty, the faculty members have developed the professional standards, and the faculty is responsible for assuring that each faculty member abides by those standards. (Tr.94-95; ER-2 at 24).

The Academic Council, in conjunction with a taskforce, developed a new committee responsible for ensuring the professional development of mid-career faculty members who typically have been at the University 4 to 6 years, referred to as post-probationary. (Tr. 80-85; 94; ER-5; ER-8; ER-9). Prior to the formation of the new committee, faculty presented options to support the career development of post-probationary faculty, including a release from teaching obligations and the opportunity for a sabbatical in order to focus on career development. (Tr. 83-84). Aside from the formation of a new standing committee, the process included modification of the Bylaws and enhanced funding. (Tr. 81-85). As a result, eight new faculty positions were authorized to be filled over the next several years. (Tr.85).

The Faculty Handbook, along with numerous examples provided by witnesses at the hearing, establish that the faculty at Elon, including faculty in the voting unit proposed by the Petitioner, formulate and effectuate operational decisions on behalf of their employer.

2. The Petitioned-For Subgroups Are Included In The Faculty Body That Exercises Managerial Authority At Elon

Limited term, visiting track, and part-time faculty members are eligible to serve on Academic Council. (ER-2 at 25; *see also id*, at 23 (defining voting privileges)). As discussed above, one of the 19 positions is dedicated for a part-time faculty representative, a position added specifically to ensure part-time faculty to formally participate in shared governance. (Tr.

59-60). The part-time faculty representative must only have worked two contiguous semesters and be elected bi-annually by part-time faculty members. (ER-2 at 26). Limited term, visiting and part-time faculty also vote to elect members to Academic Council, including two at large members at the annual March faculty meeting. (ER-2 at 25).

In addition, Elon's faculty has established standing committees and many other committees on which limited term faculty, visiting faculty and part-time faculty can serve and do serve depending upon the specific criteria established for eligibility on the committee. (ER-2 at 31-46; Tr. 97-107; 260-62). Part-time as well as limited term part-time faculty members can and do participate in developing policies, revising courses and developing the supporting documentation for majors and minors. (Ford Tr. 297-98; Bullock Tr.325-26). As discussed earlier, a faculty member provided a number of personal examples of her committee service to effectuate change, including the creation of both a major and a minor in early education while she worked on a department committee in the School of Education when she was a part-time faculty member. (Tr. 341-48). Another limited term faculty member worked on a committee to review a special education course and spearheaded the effort to revise the curriculum, leading to its presentation at the University Curriculum Committee for approval. (Tr. 325-27; ER-25).

Limited term, visiting track and part-time faculty who teach more than 18 semester hours per year vote on a variety of issues at the faculty meeting along with other faculty members, including the approval of major curriculum changes and revisions to the Bylaws. (Tr. 56-58).

Elon is not one of those universities described by the Board in *Pacific Lutheran* "as increasingly run by administrators" with a corresponding diminution of faculty authority. 361 NLRB at 1422. As noted by the D.C. Circuit in *USC*, "This is an interesting debate, and it may be relevant. Regardless of national trends, however, the Board must not lose sight of the fact

that the question before it in any case in which a faculty subgroup seeks recognition is whether *that* university has delegated managerial authority to a faculty body and, if so, whether the petitioning faculty subgroup is a part of that body.” 918 F.3d at 139-40.

Elon is not like any institution where “contingent faculty” have no seat at the faculty table where decisions are made.⁸ To the contrary, Elon’s non-tenured faculty actively participate in decision-making and thus are more like the faculty at *Yeshiva* as it existed 40 years ago. In sum, the faculty body at Elon exercises effective control with respect to critical university policies, and the faculty members included within the Union’s Petition are part of the faculty body exercising such authority. This means that all faculty are “managerial” and the shared governance model of Elon University must be preserved.

V. Conclusion

The record establishes that faculty members included within the Union’s Petition are managerial employees and therefore ineligible for union representation. Accordingly, Elon respectfully requests that the NLRB reverse the RD’s Decision and Direction of Election and dismiss the Petition.

In the alternative, if the Board finds any deficiencies in the record due to a revised legal standard, Elon requests that the matter be remanded for a new hearing. The RD, Hearing Officer and the parties in December 2018 were operating under the “majority status” rule of Pacific Lutheran, and this was prior to any criticism of the standard by a subsequent Board majority or any federal appellate court. Certainly, the RD signaled before the hearing even began that he considered the Employer’s “managerial” argument to be marginal because of the majority status

⁸ In reference to “contingent faculty” at *Pacific Lutheran*, the D.C. Circuit summarized the NLRB’s factual findings as follows: “Although the university had recently allowed contingent faculty to sit on committees, no such faculty members had yet joined a committee and, in any event, it appeared that they would have no ‘right to vote within their respective divisions, schools, or constituent departments’.” *Id.* at 131.

requirement, and consequently the Hearing Officer had limited motivation to develop the record fully on this issue, focusing her questions primarily on whether the classifications included in the Union's petition served on or were eligible to serve on committees. (Tr. 100, 104-05, 130-32). Moreover, should the current Board adopt the standard suggested by the D.C. Court of Appeals, factors not previously considered significant may require the presentation of new evidence to assist the Board in reaching the correct decision.

By way of example, factors include the consideration of whether non-tenure track faculty in the petitioned-for unit at Elon, despite holding a different status within the university, share common interests and, therefore, maintain "faculty collegiality" with tenured and tenure-track faculty, and whether faculty effectively utilize "collegial compromise" as a body on some or all of the issues relevant to managerial status. 918 F.3d at 138. This issue of collegiality amongst faculty was not previously addressed in the instant case.

Accordingly, and for the reasons stated above, Elon respectfully requests that the NLRB reverse the RD's Decision and Direction for Election and dismiss the Petition or, in the alternative, remand the matter for a new hearing.

Respectfully submitted this 27th day of April, 2020.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this the 27th day of April, 2020, a copy of Elon University's Brief in Support of Request for Review has been served via email upon the following:

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